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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

CELESTINE LEWIS, Plaintiff and Appellant, v. ASTRO OFFICE PRODUCTS, INC., et al., Defendants and Respondents.	B146579 (Los Angeles County Super. Ct. No. TC011672)

APPEAL from judgments of the Superior Court of Los Angeles County. Mario Fukuto and Michael B. Rutberg, Judges. Affirmed.

Law Offices of Ulysses L. Cook, Jr., James A. Quinn and Roslily Howard Mitchell for Plaintiff and Appellant.

Dorsey & Whitney, Joseph W. Hammell and Juan C. Basombrio for Defendant and Respondent Astro Business Solutions, Inc.

In a consolidated appeal, Celestine Lewis (Lewis) appeals from judgments entered following the granting of summary judgments. Lewis contends multiple triable issues of material fact exist and the trial court erred in granting summary judgments.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

On November 17, 1999, Lewis filed in superior court a second amended complaint against Astro Office Products, Inc, aka Astro Canon Business Solutions, Astro Business Solutions, Inc., (hereinafter collectively referred to as Astro), Canon U.S.A., Inc., Ollie Hatch, Fred Fernandez and Kaidi Jones for (1) breach of implied-in-fact contract, (2) breach of covenant of good faith and fair dealing, (3) employment discrimination on account of age, (4) wrongful termination in violation of public policy, (5) intentional infliction of emotional distress, (6) failure to prevent harassment and discrimination and (7) sexual harassment.[1] It was alleged in pertinent part that on or about September 27, 1988, Lewis began her full time employment with Astro as a customer service representative. She was terminated on September 22, 1997, by Astro, Fernandez and Jones for the stated reason of insubordination.[2]

In August 2000, Astro and Hatch each filed cross-complaints against Lewis alleging a violation of Penal Code sections 632 and 637.2, subdivision (a)(1), for recording confidential communications. Hatch's cross-complaint additionally alleged a second cause of action for invasion of privacy.[3]

On August 31, 2000, defendants filed motions for summary judgment or alternatively summary adjudication. It was undisputed that Astro sells and services

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[1] The third cause of action for age discrimination and the sixth cause of action for failing to prevent harassment and discrimination are not at issue on appeal.

[2] The only respondents to this appeal are Hatch and Astro.

[3] During discovery, defendants learned that Lewis had secretly tape-recorded several conversations between herself and Hatch following her employment termination.

Canon office products and is a wholly owned subsidiary of Canon. Hatch was Astro's executive vice president from July 1993 through January 1995 and became Astro's president in January 1995. Jones was Astro's vice president of human resources and Fernandez was the customer service manager and Lewis's supervisor. Other than his involvement in her termination, Lewis had no complaint about any action taken by Fernandez.

It was disputed whether in September 1997 Lewis refused Fernandez's request that she train a temporary worker. Lewis asserts she did not decline the request but rather that because she had previously trained several other temporary workers and no one else trained them, she told Fernandez that training temporary workers was putting her behind in her work and she simply asked Fernandez if someone else could train the new temporary worker and she "preferred not to train the temp." Lewis claims she stated, "If I don't have a choice, I will train the temp." While Fernandez declared he had asked Lewis three times to train the worker, Lewis disputes this and states she recalls discussing the training of the temporary worker with Fernandez on three occasions wherein she stated (1) she would prefer not to train the worker, (2) that "she was tired of training temps" and (3) "If I have no choice, I will train the temp." Lewis asserts she was suspended before the new temporary worker arrived and that there is a big difference between preferring not to train a temporary worker and stating she would not train a temporary worker. Lewis asserts Fernandez's interpretation of her comments as refusals was not reasonable.

It is undisputed that she was suspended on September 17, 1997, and that on September 22, 1997, she was terminated for the stated reason of "insubordination." She filed a claim with the Department of Fair Employment and Housing on November 21, 1997, but raised no complaint of sexual harassment. She did not assert any sexual harassment claim until September 22, 1998.

Lewis asserted that during a period commencing in 1993, Hatch initiated his sexual harassment of her. Hatch and Lewis had sexual relations, sometimes Lewis would

initiate the contact and other times Hatch initiated the contact. Lewis asserts that she believed that if she did not acquiesce to Hatch's demands, she would lose her job or suffer some negative consequence of her job. The last contact Lewis had with Hatch, while still employed, was approximately a week or two weeks before being suspended, in late August or early September 1997. Hatch and Lewis continued their sexual relationship after Lewis was terminated. Lewis had no evidence of any connection between her relationship with Hatch and her termination but she had told Hatch approximately two times that she wanted to discontinue their relationship.

"Summary judgment is granted when there is no triable issue as to any material fact and the moving party is entitled to judgment as a matter of law. (Code Civ. Proc., § 437c, subd. (c).) This court reviews de novo the trial court's decision to grant summary judgment and we are not bound by the trial court's stated reasons or rationales." (*Hersant* v. *Department of Social Services* (1997) 57 Cal.App.4th 997, 1001.)

Code of Civil Procedure section 437c provides in pertinent part: "(a) Any party may move for summary judgment in any action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding . . . . [¶] (n) A cause of action has no merit if either of the following exists: [¶] (1) One or more of the elements of the cause of action cannot be separately established, even if that element is separately pleaded. . . . [¶] (o) For purposes of motions for summary judgment . . . . [¶] (2) A defendant or cross-defendant has met his . . . burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto. The plaintiff or cross-complainant may not rely upon the mere allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the

specific facts showing that a triable issue of material fact exists as to that cause of action or a defense thereto. . . ."

I.

CAUSES OF ACTION FOR BREACH OF
IMPLIED-IN-FACT CONTRACT AND BREACH
OF COVENANT OF GOOD FAITH AND FAIR DEALING

As a general rule, an employment relationship is presumed to be terminable at will by either party unless there are written documents or oral agreements stating otherwise. (See Labor Code, § 2922.) However, an implied-in-fact agreement not to terminate but for good cause may be ascertained from a totality of the circumstances: the employer's personnel policies or practices, the length of the employee's service, the employer's actions or words reflecting assurances of continued employment, and industry practices. (See *Foley v. Interactive Data Corp*. (1988) 47 Cal.3d 654, 680; *Walker v. Blue Cross of California* (1992) 4 Cal.App.4th 985, 993.)

On April 9, 1992, Lewis executed a document entitled "Existing Employee Confidentiality Agreement" which recognized Astro's "right to terminate [Lewis's] employment at any time . . . ." On that date she also executed an "Agreement with Respect to Canon Policies" which recognized Astro's "right to terminate [Lewis's] employment at any time. . . ." The agreement also provided that its provisions "may not be waived, modified or terminated either in whole or in part, except by a written instrument signed by an authorized officer of Canon."

Astro's "Employee Welcome Booklet," which Lewis acknowledges she received, provides "The contents of this booklet are presented as a matter of information only. While we generally follow policies and procedures described herein, they are not a contract. The company reserves the right to modify, revoke, suspend, terminate, or change any program, policies or procedures in whole or in part at any time with or without prior notice." Under "Application and Interpretation of Company Policies" the

booklet states, "Since it is management's intent to protect the interests of both Astro and our employees, all employment with Astro is at will." The booklet discusses a transitional period for new employees and states, "At the successful completion of the transitional period, an employee's relationship with the company is still one of employment at will which may be terminated by either the employee or the company at any time." Under "Guidelines for Conduct and Courtesy" the booklet states, "The company has the sole discretion to determine under what circumstances and when discipline and discharge are appropriate." Astro also issued a written statement in 1995 to all employees, reiterating that "Employment with [Astro] is voluntarily entered into, employees are free to resign at any time, with or without cause. Similarly, Astro may terminate the employment relationship at will at any time, with or without notice or cause, so long as there is no violation of applicable federal or state law . . . . [¶] Policies set forth in this manual are not intended to create a contract, nor are they to be construed to constitute contractual obligations of any kind or a contract of employment between Astro and any of its employees. The company reserves the right to discipline or discharge employees at its sole discretion. Astro also reserves the right to change anyone's position for the purposes of alignment with company business. The provisions of the manual have been developed at the discretion of management and, except for its policy of employment-at-will, may be amended or canceled at any time, at Astro's sole discretion."

Lewis testified at her deposition that no one ever told her that she had a contract or agreement of employment and that she had no belief or understanding of such a contract or agreement. The trial court correctly dismissed the cause of action for breach of implied contract. (See *Kovatch v. California Casualty Management Co., Inc.* (1998) 65 Cal.App.4th 1256, 1276.) Because Lewis has failed to state a cause of action for breach of an implied-in-fact agreement not to terminate her except for good cause, it necessarily follows she cannot state a cause of action for breach of the implied covenant of good faith and fair dealing on the ground that she was terminated without good cause. "The

covenant of good faith and fair dealing does not transform a terminable-at-will employment contract into a terminable-only-for-good-cause contract." (*Gould v. Maryland Sound Industries, Inc.* (1995) 31 Cal.App.4th 1137, 1152.)

II.

SEXUAL HARASSMENT CLAIM

Lewis alleged in her seventh cause of action "sexual harassment-hostile work environment and quid pro quo." As a prerequisite to Lewis's suit under the Fair Employment and Housing Act, a charge of discrimination must have been filed with the DFEH within one year. (*Regents of University of California v. Superior Court* (1995) 33 Cal.App.4th 1710, 1716.) The trial court granted summary judgment finding Lewis's claims of sexual harassment were time barred.

Appellant asserts her claim for sexual harassment is not time-barred because it was filed within one year of the last wrongful act. She contends that her termination was directly related to the continuing course of sexual harassment by Hatch and that she was terminated because she informed Hatch that she would not continue to have sexual contacts with him. At her deposition, however, she testified that at no time did she ever tell Hatch that she did not want to have a relationship with him. She also testified that she had no evidence of any connection between her relationship with Hatch and her termination. "[A]n issue of fact is not raised by 'cryptic, broadly phrased, and conclusory assertions.' [Citations.] 'Thus, while the court in determining a motion for summary judgment does not "try" the case, the court is bound to consider the competency of the evidence presented.' [Citation.]" (*Sinai Memorial Chapel v. Dudler* (1991) 231 Cal.App.3d 190, 196-197.) Additionally, "[a] court may disregard a declaration, prepared for purposes of a summary judgment motion, which conflicts with deposition testimony of the declarant. [Citations.]" (*Jacobs v. Fire Ins. Exch.* (1995) 36 Cal.App.4th 1258, 1270.)

Appellant also asserts that even after termination of her employment from September 27, 1997, through December 1997, Hatch engaged in a continuing course of quid pro quo sexual harassment. She contends that defendants can be liable for sexual harassment based upon events after the employment relationship has ended. She cites no authority to support this proposition. Rather, the cases cited conclude that the hostile work environment ends on the day the employment ends (see *Draper v. Coeur Rochester, Inc.* (1998) 147 F.3d 1104, 1107) and the offending conduct must be work related. (See *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1048.)

III.

INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS

"Claims for intentional infliction of emotional distress must be brought within one year of the event alleged to have inflicted the distress. [Citations.]" (*Chavez v. Lockheed Martin Missiles & Space* (N.D. Cal. 1998) 35 F.Supp.2d 1168, 1172.) The incidents of sexual harassment while employed by Astro, which were alleged to have caused the emotional distress, occurred more than one year before the filing of the claim and are time barred. Additionally, while Lewis claimed her termination was directly related to a continuing course of sexual harassment, Lewis admitted she had no evidence connecting her termination to her relationship with Hatch. The trial court properly granted summary judgment on this claim.

IV.

CROSS-COMPLAINT FOR
VIOLATION OF CALIFORNIA PRIVACY ACT

Astro and Hatch filed cross complaints against Lewis for violation of the California Privacy Act, Penal Code section 630, et seq., for her surreptitious recording of telephone conversations with Hatch. The trial court found that Astro was entitled to

judgment as a matter of law on its cross-complaint and that therefore Astro's motion for summary judgment should be granted. Additionally, the court held that Hatch was entitled to summary adjudication in his favor on the first cause of action in his cross complaint.[4] Specifically, the court ruled that Lewis violated Penal Code section 632, subdivision (a), because, Lewis intentionally recorded five telephone conversations with Hatch, then president of Astro; Hatch did not consent to such recordings; and these conversations were confidential within the meaning of the California Privacy Act and that there were no triable issues of fact as to these matters.

Penal Code section 632, subdivision (a), provides, "Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic amplifying or recording device, eavesdrops upon or records the confidential communication . . . shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) . . . ."

Penal Code section 637.2, provides "(a) Any person who has been injured by a violation of this chapter may bring an action against the person who committed the violation for the greater of the following amounts: [¶] (1) Five thousand dollars ($5,000). [¶] (2) Three times the amount of actual damages, if any, sustained by the plaintiff."

In support of the motion for summary judgment/adjudication, Hatch submitted his declaration wherein he stated he had various telephone conversations with Lewis; Lewis never told him that any of their discussions were being tape-recorded; Lewis never told him that any of their discussions had been or were being recorded by her answering machine; he never heard a beep or an outgoing message indicating that Lewis's answering machine picked up the call and was possibly recording it; he never gave Lewis

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[4] The first cause of action was for violation of Penal Code section 632, subdivision (a). Hatch's complaint had a second cause of action for invasion of privacy, seeking among other things punitive damages. Hatch voluntarily dismissed this cause of action.

consent to tape or otherwise record any of their conversations and would not have consented had Lewis asked. He reviewed a copy and/or transcripts of the tape recordings and the contents of these communications were private and confidential. He never intended that anyone else should become aware of them and to his knowledge, the only participants in these recordings were Lewis and himself; they took place under circumstances that he understood and expected to be private; in these conversations, he not only discussed with Lewis his thoughts regarding her termination and the reasons for it but also intimate details of his life which he did not want revealed to anyone else and which he considered extremely private. After reviewing the tape recordings, it was his clear recollection that at least three of the conversations were initiated by Lewis.

Lewis filed opposition to the motion for summary judgment/adjudication and asserted the excerpts from the tapes were not authenticated, the motion was barred by the 60-day hold on motions for summary judgment and/or adjudication, triable issues of fact existed with respect to whether plaintiff intentionally taped two of the conversations, whether Hatch had a reasonable expectation of privacy at the time of the conversation and whether the communications were confidential. Lewis also asserted that the cross-complaints were not at issue as discovery was continuing on the issues raised and that Hatch's credibility was tainted. The trial court denied the summary judgment/adjudication motions without prejudice to allow Lewis an opportunity to conduct discovery but ruled as a matter of law that Lewis had intentionally tape recorded the conversations. No further discovery was made and Hatch and Astro successfully renewed their motions. At no time did Lewis provide the trial court with any evidence contradicting the evidence that Astro and Hatch presented.

Preliminarily we note, having failed to present arguments or evidence in the trial court contesting that the recordings were intentionally made, Lewis is precluded from contesting this point on appeal. (See *Martinez v. Scott Specialty Gases, Inc*. (2000) 83 Cal.App.4th 1236, 1249.) Moreover, a review of the tape recordings and evidence presented by Astro and Hatch demonstrates Lewis intentionally tape recorded

conversations between herself and Hatch. Some of the taped conversations begin with a dial tone, a ringing telephone, and then Hatch answering the phone. Lewis did not dispute the fact that she initiated at least three phone calls and that it was not an accident on her part that they were recorded. The recording of a fourth call demonstrates that Lewis intentionally turned on the answering machine in the middle of a conversation. The trial court drew the only reasonable inference, which could be made from the evidence. (See *Murillo v. Rite Stuff Food, Inc.* (1998) 65 Cal.App.4th 833, 841.)

Appellant's argument that the tape recordings were not authenticated is without merit. The recordings are those which the court had ordered Lewis to produce, which she had, in fact, produced and which her counsel had represented to be the subject tapes.

Additionally, the recorded communications were confidential. "The term 'confidential communication' includes any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but excludes a communication made in a public gathering or in any legislative, judicial, executive or administrative proceeding open to the public, or in any other circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded." (Pen. Code, § 632, subd. (c).) Hatch submitted a declaration detailing the circumstances surrounding the conversations, the topics discussed and his belief and expectation that the conversations were confidential. "The test of confidentiality is objective. . . . [Citation.] 'A communication must be protected if *either* party reasonably expects the communication to be confined to the parties.' [Citation.]" (*Coulter v. Bank of America* (1994) 28 Cal.App.4th 923, 929.) It is sufficient that Hatch, who was secretly recorded, expected the conversations to be private. Lewis and Hatch were both apparently married and engaged in an extramarital affair. The recorded communications reveal occasions when they arranged to meet for sexual encounters and contain intimate discussions regarding their encounters and personal lives. During one of the conversations, Lewis stated she would not leave a message on Hatch's voicemail, because she never knew who might listen to the

messages. Additionally, Hatch hung up the phone on one occasion when someone other than Lewis answered. Lewis testified at her deposition that she called Hatch on his private line as he was the only person who answered that line. No evidence was submitted that Hatch, whose conversations Lewis recorded, did not have a reasonable expectation the conversations were confidential.

The trial court correctly granted summary judgment on Hatch and Astro's claim for violation of Penal Code section 632.

DISPOSITION

The judgments are affirmed.

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LILLIE, P.J.

We concur:

JOHNSON, J.

PERLUSS, J.